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SEP 29 1994

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OFFICE OF THE SECRETARY
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September 29, 1994

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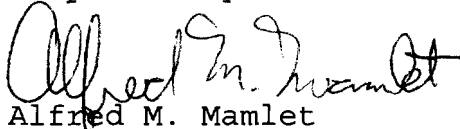
Mr. William Caton, Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation
(ISP-94-001; CC 92-166)

Dear Mr. Caton:

On September 29, 1994, Michael D. Kennedy, Philip L. Malet and I met with Scott Blake Harris, James L. Ball and Mark A. Grannis regarding the above-captioned proceedings. With respect to 92-166, we discussed Motorola Satellite Telecommunications, Inc.'s ("Motorola") comments, and reply comments and the Joint Proposal. With respect to ISP-94-001, we discussed Motorola's comments and the material contained in the enclosures.

Respectfully submitted,



Alfred M. Mamlet
Counsel for Motorola Satellite
Telecommunications, Inc.

/srh-m

Enclosure

cc: Scott Blake Harris
James L. Ball
Mark A. Grannis
David H. Solomon

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MOTOROLA SATELLITE COMMUNICATIONS, INC.

September 29, 1994

MOTOROLA

- **COMSAT'S PROVISION OF INMARSAT-P WOULD NOT BE IN U.S. PUBLIC INTEREST**

- * **INMARSAT CAN ERECT BARRIERS TO ENTRY**

- * **INMARSAT'S MARITIME MONOPOLY CAN CROSS-SUBSIDIZE INMARSAT-P**

- * **INMARSAT HAS SPECTRUM ADVANTAGES**

MOTOROLA

- **U. S. GOVERNMENT SHOULD PERMIT COMSAT TO PARTICIPATE IN THE PROVISION OF LAND MOBILE SERVICES THROUGH A NEW ENTITY ON A LEVEL PLAYING FIELD**

MOTOROLA

- **INMARSAT SHOULD HAVE NO OWNERSHIP OR
CONTRACTUAL RELATIONSHIP WITH ENTITY PROVIDING
LAND MOBILE SERVICES**

MOTOROLA

- **OWNERS OF NEW ENTITY SHOULD ALLOW U.S. COMPETITORS TO ENTER THEIR COUNTRIES**
- **IN RETURN, THE U.S. GOVERNMENT SHOULD ALLOW THE NEW ENTITY TO HAVE EQUIVALENT ACCESS TO THE U.S. MARKET**

MOTOROLA

- **NEW ENTITY DOES NOT GET INMARSAT SPECTRUM OR FILINGS**

MOTOROLA

- **COMSAT IS LEGALLY PRECLUDED FROM PARTICIPAING
IN AFFILIATE**

- * **COMSAT IS U.S. SIGNATORY "FOR THE PURPOSE OF
PROVIDING INTERNATIONAL MARITIME SATELLITE
TELECOMMUNICATIONS SERVICES"**

- * **PROVISION OF LAND MOBILE SERVICES THROUGH THE
AFFILIATE WOULD NOT BE "ANCILLARY" TO MARITIME**

MOTOROLA

	INMARSAT CONVENTION AND OPERATING AGREEMENT	PROPOSED INMARSAT AFFILIATE
GOVERNANCE	Assembly, Council and Directorate govern.	Separate Board of Directors established by Affiliate's owners governs.
OWNERSHIP	Owned by Signatories based on usage.	Ownership will include non-Signatories and probably even non-users. Ownership will be based on capital contribution without regard to usage.
LIABILITY	Owners have unlimited liability.	Owners have limited liability.
PRIORITY FOR MARITIME SERVICES	Maritime services have priority over non-maritime services.	Maritime services would not have any priority and would represent a small percentage of services.
INTELLECTUAL PROPERTY	Transfer of intellectual property must be on non-discriminatory basis.	Affiliate assumes it will receive exclusive transfer of sensitive intellectual property from INMARSAT.

- **"The Council shall have the responsibility, having due regard for the views and recommendations of the Assembly, to make provision for the space segment necessary for carrying out the purpose of the Organization in the most economic, effective and efficient manner consistent with this Convention and the Operating Agreement."**

INMARSAT Convention, Article 15

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September 27, 1994

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Re: Legal Authority of INMARSAT to Establish an
Affiliate to Provide Global Mobile Satellite
Communications Services

Dear Messrs. Kolsky and Kennedy:

This letter provides our opinion as to whether the International Maritime Satellite Organization ("INMARSAT") has the legal authority to establish the INMARSAT-P affiliate ("Affiliate") to provide global mobile satellite communications services for land mobile, aeronautical and maritime use. Our discussion is in large part responsive to the widely-circulated August 22, 1994 opinion letter prepared by the London office of Crowell & Moring ("C&M Letter") for COMSAT Corp. ("COMSAT"). The C&M Letter concludes that INMARSAT has the legal authority to establish the Affiliate. For the reasons stated below, we are of the opinion that INMARSAT does not have the authority to establish the Affiliate.

I. SUMMARY

The establishment of the Affiliate is inconsistent with INMARSAT's constitutive documents. The proposed Affiliate's governance structure, ownership structure, limited liability, failure to guarantee a priority for

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maritime services and exclusive transfer of intellectual property are impermissible under the INMARSAT Convention ("Convention")^{1/} and the INMARSAT Operating Agreement ("Operating Agreement").^{2/}

The proposed establishment of the Affiliate would violate international law because, as an international organization, INMARSAT's powers are defined by the terms of its constitutive instruments. The "doctrine of implied powers," relied upon in the C&M Letter, does not provide the authority for establishing the Affiliate, because that doctrine is rigorously circumscribed by the principles of international law. First, because the natural meaning of the Convention is neither ambiguous nor unreasonable, "supplementary means" may not be used to interpret the Convention. Second, the Convention and Operating Agreement clearly state an intention contrary to the establishment of the Affiliate. Third, establishment of the Affiliate is not "essential to the performance of [INMARSAT's] duties," the fundamental criterion for application of the "doctrine of implied powers."

The proposed activities of the Affiliate are also inconsistent with the International Maritime Satellite Telecommunications Act ("Maritime Satellite Act"),^{3/} which establishes the authority of COMSAT to participate in INMARSAT on behalf of the United States. The Maritime Satellite Act, which is relevant to the interpretation of the Convention and the Operating Agreement, does not authorize COMSAT to participate in the provision of the proposed services of the Affiliate.

^{1/} Convention of the International Maritime Satellite Organization (INMARSAT), Sept. 3, 1976, 31 U.S.T. 1.

^{2/} Operating Agreement on the International Maritime Satellite Organization (INMARSAT), Sept. 3, 1976, 31 U.S.T. 135.

^{3/} Pub. L. 95-564, 92 Stat. 2392 (1978) (codified at 47 U.S.C. §§ 751-757).

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Finally, a decision by the INMARSAT Assembly and Council to approve the establishment of the Affiliate would not be immune from review, as the C&M Letter suggests. Such a decision would be subject to challenge in various fora, including the U.S. courts, under appropriate circumstances.

II. INMARSAT CONVENTION AND OPERATING AGREEMENT

A. Inconsistencies with the Convention and Operating Agreement

The proposed activities of the Affiliate are inconsistent with the terms and structure of the Convention and the Operating Agreement in several respects:^{4/}

- INMARSAT is governed by bodies established in the Convention. The Affiliate would be governed by a separate Board of Directors established by its owners.
- INMARSAT is owned and financed by Signatories to the Operating Agreement according to a formula set out in the Operating Agreement, which calls for annual adjustment of ownership in accordance with usage. The Affiliate would be financed by, among others, entities which are not Parties or Signatories of INMARSAT, and there would be no annual adjustment of ownership shares based on usage.
- INMARSAT's liability is unlimited under the Operating Agreement, while the liability of the Affiliate would be limited.
- INMARSAT's authority to provide land mobile and aeronautical communications services is subordinate to its responsibility to provide maritime communications services. The

^{4/} Our understanding of the proposed activities of the Affiliate is based on the C&M Letter, as well as on documents COMSAT has filed with the FCC.

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structure of the Affiliate would undermine this priority of services.

- The establishment of the Affiliate could result in forbidden preferential transfers of INMARSAT intellectual property to non-INMARSAT entities.

In the absence of a decision by the INMARSAT Parties to amend the Convention and Operating Agreement, these inconsistencies would render the establishment of the Affiliate legally impermissible. The first two inconsistencies, in particular, involve critical aspects of the governance and ownership of INMARSAT. The remainder of this section discusses the inconsistencies described above in detail. For reference, the inconsistencies are summarized in the following table:

	INMARSAT CONVENTION AND OPERATING AGREEMENT	PROPOSED INMARSAT AFFILIATE
GOVERNANCE	Assembly, Council and Directorate govern INMARSAT.	Separate Board of Directors established by Affiliate's owners would govern Affiliate.
OWNERSHIP	Owned by Signatories based on usage.	Ownership will include non-Signatories and probably even non-users. Ownership will be based on capital contribution without regard to usage.
LIABILITY	Owners have unlimited liability.	Owners have limited liability.
PRIORITY FOR MARITIME SERVICES	Maritime services have priority over non-maritime services.	Maritime services would not have any priority and would represent a small percentage of services.
INTELLECTUAL PROPERTY	Transfer of intellectual property must be on non-discriminatory basis.	Affiliate assumes it will receive exclusive transfer of sensitive intellectual property from INMARSAT.

1. Governance Structure

The Convention vests exclusive control of INMARSAT in three organs: the Assembly, the Council and the Directorate.

The Assembly is composed of a representative of each Party to the Convention. Convention, arts. 10, 11. It is through the Assembly that the governmental Parties of the

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Convention participate in the governance of INMARSAT. The functions of the Assembly include the powers to:

- (a) Consider and review the activities, purposes, general policy and long-term objectives of the Organization [INMARSAT]. . . .
- (b) Ensure that the activities of the Organization are consistent with this Convention. . . .
- (d) Decide on . . . recommendations of the Council and express views on reports of the Council.

Convention, art. 12(1).

The INMARSAT Council also has a significant role in governing INMARSAT. It is composed of representatives of twenty-two of the INMARSAT Signatories.^{5/} Convention, art. 13. The Council has "the responsibility, having due regard for the views and recommendations of the Assembly, to make provision for the space segment necessary for carrying out the purposes of the Organization in the most economic, effective and efficient manner consistent with this Convention and the Operating Agreement." Convention, art. 15.^{6/}

The INMARSAT Directorate is headed by a Director General, who is "the chief executive and legal representative of the Organization and [is] responsible to and under the direction of the Council." Convention, art. 16(3).

^{5/} A Signatory must be either a Party or a public or private entity designated by a Party to sign the Operating Agreement. Convention, arts. 1(c), 2(3).

^{6/} The C&M Letter relies heavily on the language of Article 15 in its analysis of the legality of the Affiliate. Section II.B of this letter, below at pp. 13-14 & 18, discusses the analysis in the C&M Letter of this language.

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The Affiliate would be governed by a Board of Directors established by its owners. The INMARSAT Council contemplates that the Affiliate will be at least 70 percent owned by INMARSAT and its Signatories. See C&M Letter at 1-2. The remaining 30% of the ownership could be held by entities which are neither INMARSAT Parties nor Signatories. As the C&M Letter recognizes, this ownership structure would require INMARSAT "to adopt a business structure for the provision of Inmarsat-P services not specifically envisioned by the framers of the Convention and the Operating Agreement." C&M Letter at 17. In fact, because the structure of the Affiliate would disturb the carefully prescribed governance structure where "executive power [is] divided between the Assembly, Council and Directorate," C&M Letter at 16, it would be directly contrary to the Convention.

In particular, the day-to-day operations of the Affiliate apparently would not be controlled by the Council and Directorate, but by an alternative executive structure which would reflect the influence of the non-INMARSAT owners of the Affiliate. Even more importantly, the Assembly's essential oversight powers would be eliminated. This change in governance would be particularly troubling, because it is through the Assembly that the state Parties to the Convention participate in the governance of INMARSAT.

INMARSAT was created by an international agreement among state governments. However, the establishment of the Affiliate would create a body under the aegis of INMARSAT which would act outside the authority of those governments. Such a structure would be contrary to both the text and the intent of the Convention.

2. Ownership Structure

The Convention provides that "[t]he Organization shall be financed by the contributions of Signatories." Convention, art. 5(1). Furthermore, "[e]ach Signatory shall contribute to the capital requirements of the Organization and shall receive capital repayment and compensation for use of capital in accordance with the Operating Agreement." Convention, art. 5(2). The Operating Agreement provides

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that "[i]nvestment shares of Signatories shall be determined on the basis of utilization of the INMARSAT space segment. Each Signatory shall have an investment share equal to its percentage of all utilization of the INMARSAT space segment by all Signatories." Operating Agreement, art. V(1).

The proposed ownership structure of the Affiliate is inconsistent with these provisions in at least two important respects. First, up to 30 percent of the Affiliate could be owned and financed by non-Signatories, in direct contravention of Article 5(1) of the Convention. Second, the ownership shares in the Affiliate of both Signatories and non-Signatories apparently would be determined solely by their elective capital contributions. There would be no adjustment of ownership or capital contributions based on usage, as required by Article 5(2) of the Convention and Article V(1) of the Operating Agreement. Thus, as the C&M Letter recognizes, INMARSAT would be required, in establishing the Affiliate, to dispense with the requirements that "investment shares of Signatories [be] determined on the basis of utilization of the space segment [and that] investment participation [be] limited to the Signatories" C&M Letter at 16.

Maintaining ownership based on usage of the INMARSAT space segment is an important protection for the existing primacy of maritime services. If ownership is divorced from usage of the current INMARSAT space segment, the Affiliate is likely to give a higher priority to land mobile services than to maritime services in contravention of the Convention.

3. Other Inconsistencies

In addition to the fundamental problems of governance and ownership discussed above, the establishment of the Affiliate would be inconsistent with the Convention and Operating Agreement in at least three additional ways.

First, the liability of Signatories under the Operating Agreement is not limited to the amount of their capital contributions. Operating Agreement, art. XI(1). As the C&M Letter acknowledges, the liability of the

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Signatories is also unlimited under international law. C&M Letter at 17 n.42.^{2/} By contrast, the Affiliate would be established "as a limited liability company. . . ." C&M Letter at 1. The establishment of the Affiliate would therefore not only violate the Operating Agreement, but would also constitute an attempt by entities acting on behalf of an international organization (INMARSAT) to avoid the international law principles of unlimited state liability by creating a "private limited liability" affiliate under the auspices of an international organization.

Second, the authority of INMARSAT to provide land mobile and aeronautical communications services is expressly limited under the Convention. Article 3(1) provides that "[t]he purpose of the Organization is to make provision for the space segment necessary for improving maritime communications and, as practicable, aeronautical and land mobile communications." Convention, art. 3(1) (emphasis added).^{3/} The Affiliate is not obligated to, and would

^{2/} See also Ian Brownlie, Principles of Public International Law 432-476 (1990) (discussing the responsibility of states and state organs under international law). Professor Brownlie notes the statement of the Permanent Court of International Justice in Chorzów Factory (Jurisdiction), 1928 P.C.I.J., ser. A, No. 17: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form." Id. at 29, quoted in Brownlie at 434.

^{3/} The authority to provide aeronautical communications services was conferred by 1985 amendments to the Convention. See INMARSAT Doc. COUNCIL/18/SR/FINAL, para. 16.1 (1985); see also Wolf D. von Noorden, "Space Communications to Aircraft: A New Development in International Space Law (Part II)," 15 J. Space L. 147, 148-49 (1987). The authority to provide land mobile communications services would be conferred by 1989 amendments to the Convention. See INMARSAT Doc. COUNCIL/30/SR/FINAL, para. 4.3.5 (1988); see also Wolf D. von Noorden, "Land Mobile Satellite Communications: A Further Development in International Space
(continued...)"

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not, give priority to maritime communications services as INMARSAT is bound to do by the express terms of the Convention. In fact, INMARSAT recognizes that the volume of traffic handled by the Affiliate would substantially exceed the volume of maritime communications traffic handled by INMARSAT.^{9/} The absence of safeguards to ensure the primacy of maritime services violates the Convention.

Third, Article 21(8) of the Convention provides that "[t]he disclosure and use . . . of all inventions and technical information in which the Organization has acquired any rights shall be on a non-discriminatory basis. . . ." Although this provision does not raise a direct inconsistency between the Convention and the establishment of the Affiliate, it would require that INMARSAT transfer to private competitors of the Affiliate on a non-discriminatory basis the same technology which it transfers to the Affiliate. Although COMSAT has argued that INMARSAT would transfer the technology as required, there is a risk that INMARSAT's transfer of such sensitive intellectual property would not fully comply with the non-discrimination requirement of Article 21(8).^{10/}

^{8/} (...continued)
Law (Part I)," 17 J. Space L. 1, 10-11 (1989). The 1989 amendments have been ratified by the United States but have not yet been ratified by enough other INMARSAT Parties to enter into force. Thus, INMARSAT will not be authorized by the Convention to provide land mobile communications services until the 1989 amendments enter into force.

^{9/} See Participation of Comsat in an Inmarsat Program for a New Satellite System to Provide Personal Land Mobile Communications Services [hereinafter "INMARSAT-P Proceedings"], FCC File No. ISP-94-001, Motorola's Reply Comments in Support of Petition for Declaratory Ruling, at 12-14 (Dec. 23, 1993) (reproducing INMARSAT's traffic projections).

^{10/} COMSAT has recently argued before the Federal Communications Commission that transfers of INMARSAT intellectual property could be made on a non-discriminatory
(continued...)

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B. Binding Effect of the Convention and Operating Agreement under International Law

As discussed above, the inconsistencies between the proposed structure of the Affiliate and the terms of the Convention and Operating Agreement are substantial and obvious. However, the C&M Letter takes the position that the establishment of the Affiliate is nevertheless permissible because certain principles of international law empower INMARSAT to contravene relevant provisions of the Convention and Operating Agreement. We are of the opinion that the principles of law cited by the C&M Letter do not authorize the establishment of the Affiliate, while the principles of law relevant to this question absolutely bar its establishment.

It is a fundamental principle of international law that the powers of an international organization are limited by the terms of the treaty that creates it. As the Restatement (Third) of the Foreign Relations Law of the United States states the proposition: "International organizations . . . are in all respects limited by their own charters."^{11/} This principle absolutely prohibits INMARSAT

^{10/} (...continued)
basis through imposition of conditions that the intellectual property not be used in a manner that would harm INMARSAT. INMARSAT-P Proceedings, Reply Comments of COMSAT Corporation, at 14 n.19 (July 19, 1994). However, the conditions which COMSAT advances would not be non-discriminatory with respect to the use of the intellectual property. It cannot be seriously argued that a transfer of intellectual property to multiple parties is non-discriminatory where it effectively bars one or more transferees from using the intellectual property.

^{11/} Restatement (Third) of the Foreign Relations Law of the United States § 223 cmt. a (1987); see also Competence of the International Labor Organization with Respect to Agricultural Production, 1922 P.C.I.J., ser. B, Nos. 2 & 3, 44, 53-59 (In deciding that the competence of the

(continued...)

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from assuming powers that are inconsistent with the Convention and Operating Agreement.^{12/}

^{11/} (...continued)

International Labor Organization did not extend to oversight of the means of agricultural production, the Court stated: "The answer to th[is] question . . . must likewise depend entirely upon the construction to be given to the same treaty provisions from which, and from which alone, that Organisation derives its existence and its powers. . . . [T]he consideration of methods of organising and developing [agricultural] production from the economic point of view is in itself alien to the sphere of activity marked out for the International Labour Organisation by Part XIII of [its constitutive] Treaty." (emphasis supplied); Jurisdiction of the European Commission of the Danube between Galatz and Braila, 1927 P.C.I.J., ser. B, No. 14, at 64 ("As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has the power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it."); Restatement (Third) of the Foreign Relations Law of the United States, supra, § 223 ("Subject to the international agreement creating it, an international organization has . . . rights and duties created by international law or agreement."); Finn Seyersted, International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?, 4 Indian J. Int'l L. 1, 1-2 (1964) ("'[International organizations] do not possess the full international personality of the State, but only such rights and duties as follow from their constitution.'" (citations omitted)).

^{12/} "The principle nemo iudex in sua causa ["no man may be the judge in his own case"] may be thought applicable to the constitution of an international organization." A.I.L. Campbell, The Limits of the Powers of International Organisations, 32 Int'l & Comp. L. Q. 523, 524 n.9 (1983) (citing Voting Procedure on Questions Relating to Reports (continued...))

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The Convention and Operating Agreement, which are INMARSAT's constitutive instruments, are binding on INMARSAT as a matter of international law. Because, as the C&M Letter acknowledges, the structure of the Affiliate "was not contemplated by the Convention and cannot be reconciled with the Operating Agreement,"^{13/} INMARSAT's constitutive instruments prohibit INMARSAT from forming the proposed Affiliate.

The C&M Letter seeks, however, to validate its proposed departure from the express terms of the INMARSAT Convention and Operating Agreement by invoking the "doctrine of implied powers."^{14/} It is asserted that this doctrine permits INMARSAT to establish the Affiliate to provide land mobile satellite communications services, notwithstanding that this power is not granted by INMARSAT's constitutive instruments.

The C&M Letter justifies its recourse to a so-called "programmatic interpretation" of the Convention and Operating Agreement by claiming that there is an inconsistency in Article 15 of the Convention. Article 15 provides that the Council shall secure the space segment "in the most economic, effective and efficient manner consistent with this Convention and the Operating Agreement." The C&M Letter asserts that this language creates an "impossible dilemma" because, while the establishment of the Affiliate is assumed to be "the most economic, effective and efficient" course of action to secure the space segment, it is not "consistent with the Operating Agreement." C&M Letter at 17. This "inconsistency" assertedly authorizes INMARSAT to resort to "supplementary means of

^{12/} (...continued)
and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67, 99 (Lauterpacht, J., separate opinion)).

^{13/} C&M Letter at 17.

^{14/} C&M Letter at 8. This doctrine, an extension of the teleological principle of treaty interpretation, has also been termed the "programmatic interpretation doctrine," and the "theory of emergent purpose."

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interpretation" in order to derive from the Convention the authority to establish the Affiliate. The "supplementary means" chosen is the so-called "doctrine of implied powers," according to which "a power could be inferred to an international organization if the treaty establishing that organization revealed no contrary intention and if it were essential to achieve the objects of the treaty."^{15/}

The C&M Letter invokes certain decisions of the International Court of Justice,^{16/} the Vienna Convention on the Law of Treaties,^{17/} and various commentators as

^{15/} C&M Letter at 12.

^{16/} C&M Letter at 12 & n.32, citing Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer, 1926 P.C.I.J., ser. B, No. 13 ("Competence of the ILO Case") (permitting implication only where the implied power was both necessary, and entirely incidental, to the exercise of a essential, expressed power); Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 182 ("Reparation Case") (permitting the implication only of such powers as are "essential to the performance of [the organization's] duties"); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 ("Competence of the General Assembly Case") (denying implication where the implied power would have nullified an existing power); and Certain Expenses of the United Nations, 1962 I.C.J. 151 (permitting implication where exercise of the implied power was essential to the United Nations' ability to carry out its fundamental mission of promoting international peace and security).

^{17/} C&M Letter at 9-10 (citing the Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 ("Vienna Convention"). The Vienna Convention, which by its terms applies to the constitutive treaties of international organizations (art. 5), is relevant to the instant question, notwithstanding that "the [Vienna] Convention applies only to treaties which are concluded by States after the entry into force of the present Convention (continued...)

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authority for the proposition that INMARSAT may, under international law, resort to "supplementary means" to interpret the Convention and Operating Agreement.

In fact, these and other relevant authorities declare that the "doctrine of implied powers" is a narrowly tailored doctrine subject to rigorous limiting principles. As Professor Brownlie has cautioned: "The process of interpretation cannot be subordinated to arbitrary devices."^{18/} Specifically, the "doctrine of implied powers" is subject to three limiting principles. First, the doctrine may not be invoked to expand an organization's powers where the plain language of the organization's constitutive treaty states in clear and reasonable terms the limits of the organization's grant of power ("the principle of natural meaning"). Second, a power may not be implied to an international organization where its constitutive treaty expresses a contrary intention ("the principle of contrary intention"). Third, powers not expressly granted in the constitutive treaty may be inferred only "by necessary implication as being essential to the performance of [the

^{17/} (...continued)
with regard to such States," *i.e.*, after 1980 (art. 4). The rules of interpretation set forth in Articles 31 and 32 of the Vienna Convention are declaratory of customary international law. Malcolm N. Shaw, International Law 561 (3d ed. 1991).

^{18/} Ian Brownlie, Principles of Public International Law 690 (4th ed. 1990). See also Campbell, *supra* note 12, at 523 ("If an international organisation has limited powers, interpretation of its powers cannot extend them without limit."); 1 Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 342 (1986) ("Whatever the attractions of this idea [the theory of 'emergent purpose'], it is clear that the process in question is a legislative rather than an interpretative one, and must involve the assumption of a quasi-legislative function by any tribunal that embarks on it of set purpose and in a conscious and deliberate way. The Court has shown plainly that in its view the performance of such a function cannot properly form part of the interpretative process.") (footnote omitted).